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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SALVATORE CIRAMI and MARGARET CIRAMI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether the findings of the District Court, on a hearing of defendants-petitioners' application pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, that they have not shown compelling circumstances and extreme hardship to vacate a summary judgment entered against them in the amount of almost $300,000.00 was clearly erroneous as being against the weight of the evidence presented at the hearing, including evidence of the mental problems and suspension from practice of their then attorney?

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Petitioners Salvatore and Margaret Cirami pray that a writ of certiorari be issued to review the order of the United States District Court for the Eastern District of New York dated December 8, 1981, affirmed by the United States Court of Appeals for the Second Circuit on May 6, 1982, petition for a rehearing denied on June 3, 1982.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is not reported. The text of the opinion is attached as Appendix A, *infra*.

The order of the United States Court of Appeals for the Second Circuit affirming the District Court is not yet reported, and is attached as Appendix B, *infra*. The order of the Court of Appeals denying the petition for rehearing is likewise not yet reported, and attached as Appendix C, *infra*.

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit denying the petition for a rehearing was entered on June 3, 1982. The jurisdiction of this Court to review the decision below is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 United States Code, Rule 60.

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made from the operation of the judgment. The motion shall be made within a reasonable time, and

for reasons, (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the Court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

A. *Factual Background*

During the years 1961, 1962 and 1963, petitioner Salvatore Cirami (hereinafter "Cirami") operated, as a sole proprietorship, a business known as Air Freight Haulage Co., which was engaged in the business of supplying truck transportation services for merchandise of its customers. In the regular course of conducting his business, Cirami caused contemporaneous books and records to be maintained reflecting the receipts and expenditures of Air Freight Haulage Co.

To insure that the books and records of Air Freight Haulage were properly maintained, Cirami employed the services of two registered public accountants, Seymour Unterberg and Bernard Zipern.[1] Since Cirami operated Air Freight Haulage Co. as a sole proprietorship during the years 1961, 1962 and 1963, the

[1] Both Unterberg and Zipern submitted affidavits in connection with the services rendered to Salvatore Cirami. Each stated that they performed monthly bank reconciliations and verified the disbursements made in the cash disbursements journal.

income and expenses of the business were reflected on his individual income tax returns for each of the calendar years 1961, 1962 and 1963.[2]

An audit of the tax returns of Salvatore and Margaret Cirami for each of the years 1961, 1962 and 1963 was conducted by Internal Revenue Agent Edward Carroll. Mr. Carroll's report reflects wholesale disallowances of claimed business expenses for each of the years 1961, 1962 and 1963, on the theory that such expenses were not substantiated.[3] The revenue agent made no adjustments to the gross receipts of Air Freight Haulage, Co., as reflected on Cirami's income tax returns for each of the years involved. Gross income for each of such years was therefore determined to be correctly reported.

Further adjustments made to the 1962 and 1963 tax returns were the total disallowance of all itemized deductions claimed by the defendants, on the theory that they had failed to substantiate the same.

On September 14, 1966, a statutory notice of deficiency was forwarded to Salvatore and Margaret Cirami reflecting the disallowances set forth in the report of Edward Carroll.

On September 21, 1966, Louis DeStefano, then Cirami's accountant, wrote the District Director of Internal Revenue advising that he was protesting the determinations set forth in the statutory notice. On September 28, 1966, the District Director of Internal Revenue, Brooklyn, New York, wrote Mr. DeStefano acknowledging receipt of his letter of September 21, 1966 and advising the matter was under consideration.

In reliance upon the District Director's response, a petition to the United States Tax Court, pursuant to Title 26 USC, Section 6213, was not filed. On March 3, 1967, assessments were made against the taxpayers for each of the taxpayers for each of the

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[2] Cirami filed joint Federal income tax returns with his spouse Margaret Cirami for each of the years 1961, 1962 and 1963.

[3] The items disallowed, purportedly for lack of substantiation, were reflected in the books and records of Air Freight Haulage Co.

years 1961, 1962 and 1963 in the amounts set forth in the statutory notice of deficiency.

On February 28, 1973, the United States commenced an action against the Ciramis and their son, James Cirami, and other defendants in the United States District Court, Eastern District of New York. The government sought to reduce to judgment the Federal tax assessments against Salvatore and Margaret Cirami, arising out of the income tax liabilities for 1961, 1962 and 1963, to set aside certain transfers made to James Cirami by Salvatore Cirami, to foreclose the tax liens against certain properties and rights to such properties allegedly belonging to Salvatore and Margaret Cirami, and to obtain a judgment against James Cirami, as a transferee of assets of his father.

The defendants, in an effort to defend the action brought against them, retained the services of one Peter Newman, Esq., to represent them. Newman filed an answer on behalf of his clients, on March 20, 1973, which, in essence, was no more than a general denial of the allegations set forth in the complaint. In addition, a counterclaim was made on behalf of Salvatore and Margaret Cirami, subsequently dismissed by the District Court.

Pursuant to a motion filed on May 17, 1973 by the United States, a motion for partial summary judgment was filed by the government, as concerns the assessments of tax made against them in the statutory notice of deficiency. The Notice of Motion was sent to their then attorney, Newman, the defendants themselves being unaware of it. No opposition was filed by defendants' counsel, Peter Newman, to such motion when, in fact, there were sufficient factual and legal bases to oppose such motion.[4]

On June 12, 1974 partial summary judgment was entered in favor of the United States to the extent that plaintiff now has a

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[4] The factual basis for opposing the Motion for Summary Judgment is the existence of books and records which substantiate the disallowed expenses. The legal basis for opposing the motion is that even without considering the records, the defendant would be entitled to an allowance of a reasonable amount of business expenses. *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930).

final judgment against Salvatore and Margaret Cirami for income tax liabilities for the calendar years 1961, 1962 and 1963 in the amount of $270,792.43, plus interest from the date of entry. On July 5, 1974, Notice of Entry of Judgment was filed.

Subsequent thereto, defendant Salvatore Cirami changed legal counsel to Carl Mione, Esq., and defendant Margaret Cirami substituted the firm of Wagman, Cannon & Musoff, P. C., as counsel.[5]

On May 1, 1975, defendants-appellants filed a Notice of Motion, returnable before the Honorable Walter Buchhausen, United States District Judge, Eastern District of New York, on May 27, 1975, together with supporting papers, for an order vacating the summary judgment entered in favor of the Government against the Ciramis on June 12, 1974, in the amount of $270,792.43, plus statutory interest.

On May 27, 1975, a hearing was held in the chambers of Judge Buchhausen. As a result, defendants were granted leave until July 1, 1975 to file additional data in support of the Motion to Vacate Summary Judgment.

On July 1, 1975, defendants submitted additional factual data to support the motion. The documentation consisted of affidavits from the two accountants, Seymour Unterberg and Bernard Zipern, who audited the books and records of Air Freight Haulage Co. during the years 1961, 1962 and 1963, a series of thirty exhibits of records of Air Freight Haulage Co. from the years 1961, 1962 and 1963, including the check disbursements journal from January, 1959–November 12, 1963, the check stubs from March 4, 1961–June 16, 1972 and April 16, 1963 through August 10, 1963[6] and payroll books for the years 1961, 1962 and 1963, and an analysis by Seymour Unterberg verifying substantially all the business expenses claimed on the tax returns of

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[5] All the Ciramis are now represented by Wallace Musoff, Esq.

[6] The cancelled checks could not be located, although they had been examined by the original auditor, Revenue Agent Carroll.

defendants for the years 1961, 1962, 1963 per the available records, as submitted to the Court.[7]

On September 3, 1975, the plaintiff filed a Supplemental Memorandum in Opposition to taxpayer's Motion to Vacate Summary Judgment. Ostensibly, this memorandum was to respond to the data submitted. In fact, it did not. The sum and substance of the government's response was that the affidavits of the two accountants who did the bank reconciliations for Air Freight Haulage Co., verifying that the checks set forth in the check disbursements journal were cancelled, did not, in the absence of the actual cancelled checks, corroborate payment. Second, the government, by citing a conviction of Salvatore Cirami for the years 1967 through 1970—four years subsequent to the last taxable year involved in the instant case—for activities involving a separate and distinct corporate entity, Air Package Distribution Service Ltd., *not* Air Freight Haulage Co., endeavored to persuade the District Court that the Ciramis were not worthy of relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure.[8]

On October 6, 1975, Judge Bruchhausen issued a Memorandum and Order denying defendants Motion to Vacate Summary Judgment. The substance of the Court's opinion was that a motion pursuant to Rule 60(b)(6) was not timely, the defendants did not overcome the presumption of correctness of the assessments, and extraordinary circumstances to grant the relief under Rule 60(b)(6) had not been shown.

B. *Prior proceedings on appeal*

The Court of Appeals for the Second Circuit initially affirmed Judge Bruchhausen's denial of Rule 60(b)(6) relief, holding that

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[7] Copies of all records submitted to the Court were timely submitted to plaintiff.

[8] It should be noted, that the conduct for which Cirami and his son were convicted (attempted evasion of FICA taxes) has been decriminalized under the new regulations (See CCH, Standard Federal Tax Reports Vol. 66, No. 14, March 28, 1979) whether an individual is an employee or an independent contractor is no longer being pursued by the government, since it is recognized that it is not economically harmed.

although Cirami had submitted extensive evidence relative to the merits of the underlying tax claim, no evidence was submitted of any circumstances pertaining to the failure of their *then* attorney, Newman, to respond to the government's Motion for Summary Judgment on the tax assessment claim, *United States v. Cirami*, 535 F. 2d 736 (2d Cir. 1976).

Thereafter, the Ciramis' new counsel, Wallace Musoff, filed a second motion for Rule 60(b)(6) relief, which included affidavits basically alleging that the failure of the Ciramis *then* counsel, Newman, to respond to the government's summary judgment, was due to a psychological disorder suffered by Mr. Newman manifesting itself in his inability to complete work promised for his clients, which ultimately led to Bar Association grievance proceedings being brought against him for similar failures in behalf of other clients, resulting in Newman's suspension as a practicing attorney.

Also submitted with this renewed motion was a memorandum written by the government attorney then handling the Cirami matter, showing that the government knew before its motion for summary judgment was granted, that even Judge Bruchhausen, before whom the action was pending, was unable to reach Mr. Newman.

This memorandum was first discovered by the Ciramis new attorney, Wallace Musoff, pursuant to Freedom of Information Act disclosures.

The renewed or second Rule 60(b)(6) motion was denied by the District Court based on a misapplication of the "law of the case" doctrine.

In the second appeal to the Second Circuit, the District Court's order was reversed, and the matter was remanded for a hearing, *United States v. Cirami*, 563 F.2d 26 (2d Cir. 1977). The Second Circuit held that the Ciramis had alleged a set of "exceptional circumstances" resulting in a "situation of extreme hardship" to them. Because it would be appropriate to accomplish justice, they held that these allegations, if proved, would justify Rule 60(b)(6) relief.

The Second Circuit's decision reversing the District Court and remanding the matter for a hearing was handed down on December 1, 1977; the hearing on remand was not held by the District Court until May of 1981. It is from the decision of the District Court pursuant to this hearing that this petition is made, said order having been affirmed by the Second Circuit (Appendix B, *infra*), and the petition for rehearing denied (Appendix C, *infra*).

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS PROVED THE EXCEPTIONAL CIRCUMSTANCES RESULTING IN EXTREME HARDSHIP JUSTIFYING RULE 60(b)(6) RELIEF; THE DISTRICT COURT'S ORDER DENYING RELIEF WAS CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE.

Petitioners are mindful of the heavy burden of persuasion they bear in order to convince this Court that the District Court's decision denying Rule 60(b)(6) relief should be reversed. Findings of fact by a lower Court are not set aside on appeal unless they are clearly erroneous and against the weight of the evidence. The "clearly erroneous" test can be summarized as having been satisfied when a reviewing Court finds that—although there is evidence supporting the finding—on reviewing the entire record, it is left with a definite and firm conviction that a mistake has been committed, resulting in an injustice. See, e.g., *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 80 S.Ct. 1190 (1960); *Guzman v. Pichirillo*, 369 U.S. 698, 82 S. Ct. 1095 (1962); *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 83 S.Ct. 1773 (1963), setting aside as clearly erroneous; on remand, 231 F. Supp. 240, (S.D.N.Y. 1964); *Roemer v. Board of Public Works*, 426 U.S. 736, 96 S.Ct. 2337 (1976); Rule 52(a) F. R. Civ. P.

With this standard in mind, petitioners submit that the District Court's decision based on the evidence presented at the hearing was clearly erroneous, as shown by the following analysis.

A.

THE DISTRICT COURT'S ANALYSIS OF THE EVIDENCE WAS NOT OBJECTIVE, BUT PREJUDICED BY ITS PREJUDGMENT OF THE MERITS OF THE UNDERLYING TAX ASSESSMENTS.

The Court of Appeals, in reversing the District Court's initial denial of Rule 60(b)(6) relief remarked that the facts as alleged in the moving papers and affidavits outlining the basis of the Ciramis claim for relief told an "extraordinary" tale (563 F.2d 26 at 34), and concluded its opinion by making the following observation:

> While we do not, of course, pass upon the merits of the defenses asserted by the Ciramis to the underlying tax assessments against them, we do observe that their submissions, if established at trial, could well result in a substantial reduction of the amount of tax and interest claimed by the government and awarded in full by Judge Bruchhausen in granting summary judgment on the tax assessment claim, thereby considerably ameliorating what the Ciramis have sought to show is a most severe blow to them. (563 F.2d 26 at 35).

With these prefatory remarks, this Court then remanded the case for an evidentiary hearing on the allegations made in support of the motion, stating that these allegations—if proved—would constitute a basis of Rule 60(b)(6) relief.

The Court of Appeals did not pass upon the merits of the underlying tax assessments and the Ciramis' defenses to them, because they were not before them for decision. Neither were they before the District Court to pass upon on remand. For that

reason, no evidence on the merits of the underlying tax assessment was presented.

Yet, in a cruel parody of the Court's observations made in reversing and remanding, the District Court—in the very first sentence of its memorandum—decided the merits of the underlying tax assessments made against the Ciramis adversely to them. Most remarkably, of course, it did so without hearing any evidence whatsoever on the merits, *which were not before the Court for consideration.*

In reaching out and doing so, the District Court not only elevated what still remains solely an administrative entry made by the auditing agent to a final judgment immediately enforceable at disastrous consequences to the Ciramis, but also colored its judgment in evaluating the evidence on the only issue which was before it: whether the Ciramis had proved extraordinary circumstances resulting in a great hardship, justifying the setting aside of a summary judgment against them of almost $300,000.00, plus statutory interest.

Thus, the District Court's finding that "This is an extraordinary case, not by reason of anything the defendants have shown but because of their adroitness in avoiding payment of tax deficiencies . . ." is not only clearly erroneous in that it is without basis in fact or evidence, but indicative of his attitude towards the defendants.

Similarly, the District Court gratuitously observes that although the government has been accruing interest on the amount assessed, the inflation rate over the years has reduced it to a "relatively small amount," and further, that the evidence tended to show him that the defendants were not in a hardship position, but "just the opposite" in terms of their ability to pay the taxes assessed. (Footnotes 1 and 3 of memorandum of the District Court dated December 8, 1981).

The remarkable end result was that the District Court—without having the matter before him on its underlying merits, and without hearing a shred of evidence on these issues—was able to totally reverse the observation and tenor of the Court of

Appeals as quoted earlier, and set the stage for findings of fact on the only issue actually before him, which were clearly erroneous and against the weight of the evidence.

B.

THE FINDINGS OF THE DISTRICT COURT WERE CLEARLY ERRONEOUS AND AGAINST THE WEIGHT OF THE EVIDENCE.

The District Court concluded that the granting of summary judgment by Judge Bruchhausen was predicated not on any misconduct or any "mental disorder" of attorney Newman, but rather the failure of the defendants to provide Newman with "not even one single document with which to oppose the motion."

To come to this conclusion, the District Court relies almost exclusively on the testimony of attorney Newman offered at the remand hearing. Before analyzing that testimony, it is appropriate to put it in its proper context, not only of this entire case, but more specifically of the remand hearing itself.

As the attorney who represented the Ciramis at the time the government's motion for summary judgment was granted "without opposition," Newman clearly was as much an interested witness in this proceeding as is the defendant Cirami himself.

Newman himself realized this, and manifested a reluctance to even testify at these proceedings out of fear of saying something on the record, under oath, which might subject him to either a malpractice claim by any number of former clients, or another disciplinary proceeding before the Grievance Committee of the Bar Association. Newman initially applied to the District Court for a sealing order, which was denied. Newman's initially stated reason was to spare himself embarrassment, then one of privilege as to his past treatment for his mental disorder. Eventually, the District Court *sua sponte* recognized that there was indeed a problem as to Newman giving testimony, and adjourned his appearance for several weeks so that he could consult with an

attorney, not wanting to put Newman in a position ". . . which is going to prejudice you or get you into trouble" as well as to consider various privileges possibly available to him, such as attorney-client and Fifth Amendment. The District Court also recognized Newman's potential civil liabilities resulting from his proposed testimony, and commented that he had "various complicated problems."

It might be parenthetically added at this point that the delay from the time of the Second Circuit's decision remanding the matter for a hearing (September, 1977), to the date of the actual hearings (May, 1981)—a period of almost four years—was occasioned by the District Court's allowing Newman time to straighten out his various personal problems, including the proceedings before the Bar Association Grievance Committee resulting in a suspension of two years, discussed later.

Secondly, it is uncontradicted that Newman had a mental disorder for which he received extensive treatment (between 60 and 80 sessions) over a two-year period from a licensed psychologist. This treatment was terminated unilaterally by Newman in 1971 *not* because he could in any way be considered improved, but rather that he in fact was not better and still suffering from the disorder; Newman himself later admitted that his problem *got progressively worse* in the following years, and manifested itself in disastrous consequences for him both personally and professionally, the most obvious result being his suspension from practice as an attorney. The testimony of Dr. Zacker is brief, uncontradicted, and amply demonstrates not only that Newman was suffering from a *real*, clinically identifiable mental disorder, but also that the behavioral manifestations relative to his lack of performance and failure as attorney for the Ciramis in this case is consistent with this disorder.

Thirdly, it is uncontroverted that attorney Newman was the subject of disciplinary proceedings resulting in his suspension from practice as an attorney for conduct which his attorney at the initial states of *those* proceedings characterized as ". . .exactly the same situation that happened in this (Cirami) case."

A brief summary of the file of the Appellate Division Second Department, received in evidence in its entirety at the hearing

before the District Court, reveals that the proceedings against Newman were initiated by a Joint Bar Association Grievance Committee for the Tenth Judicial District. The matter was eventually heard by a referee who took testimony, including Newman's. Pages 225-229, 234-235, 258-260 of Newman's testimony before the referee again is replete with references to his mental disorder as being the cause of his professional problems.

The referee, by a report dated April 29, 1977, recommended suspension, citing at page 11 of his report, Newman's mental problems. On August 1, 1977, the Appellate Division of the Supreme Court of the State of New York for the Second Department suspended Newman from practice for an indefinite period of time *until he adduced proof that he possessed the emotional stability required of an attorney*. On November, 1977 Newman petitioned for reinstatement. This petition was denied on April 11, 1978 because Newman did not yet demonstrate his emotional stability. Additionally, the subcommittee cited Newman's failure to respond to a second set of charges.

Dr. Reiter (Dr. Zacker's supervisor) again treated Newman from August to December of 1977, and again in February of 1978. On June 16, 1978 the matter was again remitted to a subcommittee on Newman's motion to be reinstated. After considering the further report of Dr. Reiter, as well as that of an independently appointed psychiatrist, concluding that Newman now possessed sufficient emotional stability, the sub-committee recommended reinstatement. On April 20, 1979, Newman was reinstated to practice as an attorney by order of the Appellate Division.

The disciplinary file of the Appellate Division amply and clearly demonstrates that Newman's professional problems and failures had their genesis in severe emotional and mental problems. In fact, they were so severe that he was suspended from practice for lack of the requisite emotional stability required of an attorney. It further demonstrates that, only after several psychiatrists certified Newman to be emotionally stable, was he again reinstated to practice. The disciplinary proceeding file amply corroborates Newman's own testimony at this hearing

that his problems only got worse *after* he discontinued his sessions with Dr. Zacker in 1971.

It is with this background that one must evaluate the District Court's acceptance of Newman's testimony that Cirami "did not supply him with one iota of business records, resulting in his inability to oppose the government's summary judgment motion." Not only does this assertion contradict the testimony of Cirami and DeStefano, that records were made available to Newman but—most importantly—flies in the face of the physical existence of *seven large brown file envelopes of business records* docketed with the District Court, as part of this lawsuit.

The District Court selectively credited that aspect of Newman's testimony, yet completely ignored his testimony that he failed to return calls to avoid lying to his clients about the progress of their matters, as well as his constant assurances to inquiries that he was "taking care of matters" and that everything was "under control." It also ignored Newman's testimony wherein he articulated defenses he knew he could have raised in opposition to the summary judgment motion, yet failed to do. It also ignored Newman's testimony that he did not necessarily believe DeStefano that the records were lost, and in fact believed that government agents were probably in possession of these records. It also ignored his testimony of missing meetings in chambers, doing things in a "sloppy manner" in "those days," and failing in his obligation as attorney to Mr. Cirami.

The record of Newman's testimony is replete with his pervasive inability to recall any of the basic facts and events concerning his representation of Mr. Cirami. Much to the District Court's amazement, Newman could not even recall the *year* he was admitted to the bar! Yet, despite this record of testimony and background, the District Court chose to credit one aspect of his testimony—that not one substantiating record was ever made available to him—and then makes it the entire rationale of its decision denying relief to the Ciramis.

Even more amazingly, the District Court found Newman's conduct *after* the summary judgment motion was granted, to be "sensible" and "logical" under the circumstances. It reaches

this conclusion from the fact that Newman again reappeared for later conferences and maneuverings regarding the fraudulent conveyance aspects of the case. Yet, it fails to realize that once the underlying tax assessments were reduced to judgment—which they now were due to Newman's failure to oppose the summary judgment motion—the transfers in question become fraudulent by simple operation of law, there being no issues to litigate any further, since the tax liabilities would render Cirami insolvent as of the date of the transfers.

Oddly enough, the District Court does not even mention the fact that at the very crucial time when the summary judgment motion was about to be disposed of, even Judge Bruchhausen's law clerk, on two occasions, was unable to reach Newman, who had missed appearances scheduled in chambers on the summary judgment motion. Yet, in light of this conduct by an attorney, the District Court calls counsel's argument that Newman "constructively disappeared" a "fantasy," "completely destroyed" by the fact of Newman's later appearances. One can only ask: To what avail were the attorney's further services to his client, once he allowed the one and only crucial aspect of the litigation—for which he was paid and retained as a lawyer who held himself out as an expert in tax matters—to flow, unhampered, down the drain?

The same can be said for the District Court's conclusion that the Ciramis failed to show that Newman was suffering from a mental disorder "sufficient to affect his performance in the case." Yet, the expert testimony was uncontradicted, detailed, and to the point. Certainly the Appellate Division of the State of New York—charged by law[9] with the supervision and discipline of its licensed attorneys—thought it was "sufficient to affect his performance," since it suspended him from practice for almost two years (1977 to 1979) for that very reason. Only after it was convinced—through the testimony of several psychiatrists (including an independent, court-appointed one)—that Newman was sufficiently emotionally stable, was he readmitted to practice.

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[9] McKinney's Judiciary Law, Section 90

Curiously enough, just after Newman's testimony at the hearing, the District Court commented to the effect that an attorney would not have to be psychotic, only "sufficiently mentally deranged, not to be looking after which (he) assumed a professional responsibility for," an eminently correct observation.

Similarly not mentioned in his memorandum is the extensive, uncontroverted—moreover, corroborated by Newman—testimony of Cirami, Mione (the original referring attorney) and DeStefano, attesting to the dozens of inquiries each made to Newman for status reports, both before and after the default. On those occasions when he was reached, Newman's response always was "everything is under control" and "I am taking care of it," as Newman himself admitted.

C.

THE DEFENDANTS HAVE MET THEIR BURDEN OF PROOF.

It is respectfully submitted that the evidence adduced at the hearing indeed amply demonstrates Newman's "constructive disappearance," and that he was indeed suffering from a clinically identifiable mental disorder (passive-aggressive personality disorder) which led him to neglect completely the most crucial aspect of his clients' business, while at the same time assuring them—as well as the referring attorney and accountant—that he was attending to it, and who had even made himself unavailable even to the trial judge at the most crucial juncture of the case. Moreover, the evidence clearly demonstrates that Newman's conduct was engendered by a mental disorder which manifested itself to the clients only after they had relied on him for months, and the case was (for all intents and purposes) totally lost.

Further, the evidence at the hearing demonstrated that not only Cirami himself, but also attorney Mione, accountant DeStefano and *Judge Bruchhausen's law clerk as well*, made repeated diligent efforts to contact Newman, to no avail.

Newman did not miss out on one small procedural step in a complicated litigation; *he blew the entire case*. He did not miss an ordinary appearance to conference some insignificant aspect of the case; *he failed to appear* at chambers on the most crucial aspect of the entire case, and *made himself unavailable* to the U.S. District Judge in charge of the litigation—despite repeated warnings and notices—who was about to terminate it most unfavorably to his clients.

Newman's failure in early 1974 to file opposing papers and attend chambers conferences had devastating results to the client who retained him to represent their interests. First, the huge amount of the actual judgment is still on file, just waiting to be collected, pursuant to which Cirami, his wife, his son and daughter-in-law can all be literally ruined professionally and personally (by the sale of their homes). Then there is the incalculable cost—not only in dollars and cents, but endless anguish—of more than eight years of litigation, including three appearances before the Court of Appeals. All to obtain the right to merely deal with the case on its merits, which have yet to be reached since the administrative entry assessing taxes was made in 1967, almost fifteen years ago.

Surely, it is the height of insensitivity and basic injustice to characterize an individual's attempts to challenge a patently unfair unilateral tax assessment, made by an auditing agent, as the "skilled adroitness in avoiding payment of taxes." This is especially so since the District Court is willing to accept, without a basis in fact, the proposition that such assessed tax deficiencies are correct, and the Ciramis owe them. In fact, the conclusion is inescapable that the assessments were totally arbitrary. Even the Court of Appeals, in its opinion reversing and remanding the District Court's decision—while being careful to note that it was not determining the case on its merits—recognized that the documentary submissions filed with the appeal ". . . could well result in a substantial reduction of the amount of tax and interest claimed by the government and awarded in full by Judge Bruchhausen in granting summary judgment. . ."

In *Foley v. United States, et al*, 645 F.2d 155 (2d Cir. 1981), the Second Circuit held the denial of a Rule 60(b) motion to

vacate a judgment of dismissal based on inexcusable delay to have been an abuse of the District Court's discretion. *Foley, supra*, was a lawsuit for personal injury. In reversing the denial of the Rule 60(b) motion to vacate, the Second Circuit observed that "Dismissal is a severe and unrelenting remedy for the series of mistakes and logistical difficulties that befell the plaintiff in prosecuting this claim," and that it was difficult to imagine what prejudice might arise to the government in comparison to the substantial injustice suffered by the petitioner.

These questions beg to be answered in this case. What prejudice would the government in this case suffer in comparison to the substantial injustice suffered by the Ciramis, in having a determination of their tax liability *on its merits*? What more severe and unrelenting remedy than the summary judgment entered in this case can be imagined based on the difficulties that befell the Ciramis as a result of attorney Newman's failures?

This petition represents the Ciramis the last chance to obtain the justice they are entitled to, and which this Court can and must give them.

CONCLUSION

It is respectfully submitted that this case represents an aggravated instance of the need for relief for which Rule 60(b)(6), Federal Rules of Civil Procedure was designed. To begin with, there was the arbitrary nature of the statutory notice of deficiency which never was dealt with in its merits in the Tax Court through no fault of the petitioners. The record of their then attorney in dealing with the government's motion for summary judgment can only be described as appalling. Motions for summary judgment almost never lie, since they are not proper where contested issues of fact exist. Yet, the arbitrary statutory notice of deficiency—totally disallowing any costs to a service business—is now elevated to the level of a final judgment. Additionally there are the uncontroverted facts of the attorney suffering from a recognized mental disorder and his suspension from practice for identical failures on behalf of other clients he represented during the same period of time.

On the other hand we have a petitioner who did—and continues to tenaciously do—everything in his power to meet the issues on their merits, yet found himself let down at the most crucial stage by an attorney he hired and paid to represent his best interests.

Respectfully submitted,

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